Kulai Edible Oils Refinery Sdn Bhd & Anor v Lim Tian Huat & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D–22–2136 OF 2001
HANIPAH FARIKULLAH JC
21 JUNE 2010

Companies and Corporations — Indoor management rule — Apparent authority — Whether senior general manager of company had apparent ostensible authority to act on behalf of directors to enter into consent order

Companies and Corporations — Winding-up — Liquidators — Leave to proceed, against — Failure to obtain consent of liquidator to continue with legal proceedings — Whether action should be struck out

Evidence — Adverse inference — Failure to call material witness — Allegation by plaintiff that signature on company's resolution falsified — Failure to call purported signatories, company secretary and expert witness — Whether adverse inference ought to be drawn against plaintiff — Evidence Act 1950 s 114(g)

Evidence — Burden and standard of proof — Forgery of signature — Denial of execution of document — Allegation of fraud in civil proceedings — Burden to call material witnesses and expert witness to establish forgery — Standard of proof beyond reasonable doubt but not proof beyond shadow of doubt

Evidence — Documentary evidence — Forgery of document — Denial of execution of document — Burden to call material witnesses and expert witness to establish forgery — Standard of proof beyond reasonable doubt but not proof beyond shadow of doubt

Tort — Conversion — Claim in conversion — Solicitor selling client's car and using proceeds of sale to settle outstanding legal fees due to him — Sale done pursuant to court order — Whether amounted to conversion of car

This action was commenced on 20 December 2001 and subsequently the first plaintiff was wound up by an order of the court dated 10 January 2002. The second plaintiff was a former director of the first plaintiff. On 20 April 2001

the first defendant was appointed as the receiver and manager of the first plaintiff. The second defendant was a firm of solicitors. On 27 June 2001, the first defendant commenced proceedings in the High Court against the first plaintiff ('the proceedings') to prevent the directors and officers of the first plaintiff from interfering with the management and assets of the company. The second defendant entered an appearance on behalf of the first plaintiff and thereafter the second defendant entered into a consent order on behalf of the first plaintiff with the first defendant. The consent order, inter alia, contained a term that the second defendant was entitled to sell a Mercedes-Benz car belonging to the second plaintiff and use the proceeds to settle the second defendant's costs. However, the plaintiffs averred that in entering the consent order, the second defendant acted without authority and consent of the first plaintiff. The second defendant averred that by virtue of the first plaintiff's resolution dated 2 May 2001 ('the resolution'), it had the authority to act on behalf of the first plaintiff in entering the consent order and that the consent order was entered pursuant to the instructions of the third defendant, who was at the material time, the senior general manager and agent of the first plaintiff. The second defendant claimed that the second plaintiff as agent of the first plaintiff had agreed vide a payment voucher dated 11 July 2001 to transfer the car to the second defendant for the settlement of the legal fees of RM250,000 owed by the second plaintiff. The plaintiffs on the other hand claimed that the resolution purportedly appointing the second defendant as their solicitors was a forgery because the directors (including its chairman and one Saleem Yaqoob) never signed the resolution. The second plaintiff also claimed that his car had wrongfully been made the subject matter of the consent order. According to the second plaintiff, his car was unlawfully appropriated by the second defendant and he had suffered losses and damages. Therefore the second plaintiff prayed for an order that the car be returned by the second defendant to him or alternatively the second defendant pay the costs of the car. The second plaintiff denied signing the voucher and alleged that his signature was forged on the voucher. The first defendant raised a preliminary objection that since the first plaintiff had been wound up and the liquidator had not given consent for the first plaintiff to continue with this proceedings, the action should be struck out since leave was not obtained from the court.

Held, dismissing the second plaintiff's claim against the second defendant:

(1) Leave of the court should have been obtained before the first plaintiff continued with the action against the defendants. In the absence of such order, the first plaintiff's action against the first defendant was struck out (see para 21).

(2) It was incumbent upon the second plaintiff to call the chairman or Saleem Yaqoob as witnesses to testify as to whether they signed the resolution. An adverse inference could be invoked against the second plaintiff for not calling the chairman or Saleem Yaqoob. The company

secretary who would have had direct knowledge as to whether the chairman and the directors had signed the resolution was also not called as witness. Further, since the court was not able to find PW2 (another director of the first defendant) as a trust worthy witness, the court could not safely rely on his evidence that his signature too was forged. An expert witness should have been called by the second plaintiff to assist the court in verifying the authenticity of signatures on the resolution. However in this case the second plaintiff failed to do so (see paras 60–61 & 67–68).

(3) The standard of proof for an allegation of fraud in civil proceedings is that of proof beyond reasonable doubt. Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt. Based on the evidence adduced, it was not proven beyond reasonable doubt that the resolution was forged (see paras 74–75).

(4) The third defendant was represented to the second defendant as having the authority to act on behalf of the first plaintiff. The third defendant was perceived by the second defendant as person with the apparent ostensible authority to act on behalf of the directors of the first plaintiff to enter the terms of the consent order. The fact that the third defendant did not inform the second defendant that he had no authority was not the concern of the second defendant, it being an internal matter of the first plaintiff (see paras 88–90).

(5) The probability of the signature on the voucher having been a genuine signature could not be ruled out. Under s 103 of the Evidence Act 1950, it was for second plaintiff to call an expert witness to prove that the signature on the voucher was not his (see para 95).

(6) Pursuant to the consent order, the second defendant was authorised to sell the car and to use the proceed of the sale for the settlement of the legal fees due to him. Thus, the second defendant had not converted the second plaintiff's car (see para 101).

[Bahasa Malaysia summary

Tindakan ini telah dimulakan pada 20 Disember 2001 dan selepas itu, plaintif pertama digulungkan melalui perintah mahkamah bertarikh 10 Januari 2002. Plaintif kedua merupakan bekas pengarah plaintif pertama. Pada 20 April 2001, defendan pertama telah dilantik sebagai penerima dan pengurus untuk plaintif pertama. Defendan kedua merupakan sebuah firma guaman. Pada 27 Jun 2001, defendan pertama memulakan prosiding di Mahkamah Tinggi terhadap plaintif pertama ('prosiding tersebut') untuk menghalang

pengarah-pengarah dan pegawai-pegawai plaintif pertama daripada campur tangan dengan pengurusan dan aset-aset syarikat tersebut. Defendan kedua telah memasukkan kehadiran bagi pihak plaintif pertama dan selepas itu, plaintif kedua telah memasuki perintah persetujuan bagi pihak plaintif pertama dengan defendan pertama. Perintah persetujuan tersebut, antara lain, mengandungi terma bahawa defendan kedua berhak menjual kereta Mercedes-Benz kepunyaan plaintif kedua dan menggunakan hasil kutipan untuk menjelaskan kos defendan kedua. Walau bagaimanapun, plaintif-plaintif menegaskan bahawa dalam memasuki perintah persetujuan tersebut, defendan kedua telah bertindak tanpa autoriti dan persetujuan plaintif pertama. Defendan kedua menegaskan bahawa mengikut resolusi plaintif pertama bertarikh 2 Mei 2001 ('resolusi tersebut'), ia mempunyai autoriti untuk bertindak bagi pihak plaintif pertama dalam memasuki perintah persetujuan dan bahawa perintah persetujuan telah dimasuki menurut arahan defendan ketiga, yang mana pada masa matan, merupakan pengurus am kanan dan agen plaintif pertama. Defendan kedua mendakwa bahawa plaintif kedua sebagai agen plaintif pertama telah memberi persetujuan melalui pembayaran baucar bertarikh 11 Julai 2001 untuk menyerahkan kereta tersebut kepada defendan kedua untuk menjelaskan yuran guaman sebanyak RM250,000 yang belum dibayar oleh plaintif kedua. Plaintif-plaintif sebaliknya mendakwa bahawa resolusi yang didakwa melantik defendan kedua sebagai peguam mereka adalah palsu oleh kerana pengarah-pengarah (termasuk pengerusi dan Saleem Yaqoob) tidak pernah menandatangani resolusi tersebut. Plaintif kedua juga mendakwa bahawa keretanya secara salah telah dijadikan perkara subjek perintah persetujuan tersebut. Mengikut plaintif kedua, keretanya telah diambil dengan menyalahi undang-undang oleh defendan kedua dan dia telah mengalami kehilangan dan kerugian. Oleh itu, plaintif kedua telah memohon perintah untuk kereta tersebut dikembalikan oleh defendan kedua kepadanya atau sebagai alternatif, defendan kedua untuk membayar kos kereta tersebut. Plaintif kedua menafikan dia telah menandatangani baucar tersebut dan mengatakan bahawa tandatangannya pada baucar tersebut telah dipalsukan. Defendan pertama telah mengemukakan bantahan awal bahawa memandangkan plaintif pertama telah digulungkan dan likuidator tidak memberi kebenaran kepada plaintif pertama untuk meneruskan prosiding ini, tindakan tersebut seharusnya dibatalkan memandangkan kebenaran tidak diperolehi daripada mahkamah.

Diputuskan, menolak tuntutan plaintif kedua terhadap defendan kedua:

(1) Kebenaran mahkamah seharusnya diperoleh sebelum plaintif pertama meneruskan tindakan terhadap defendan-defendan. Dalam ketiadaan perintah tersebut, tindakan plaintif pertama terhadap defendan pertama dibatalkan (lihat perenggan 21).

(2) Adalah menjadi kewajipan defendan kedua untuk memanggil pengerusi atau Saleem Yaqoob sebagai saksi-saksi untuk memberi keterangan sama ada mereka telah menandatangani resolusi tersebut. Inferens bertentangan boleh digunapakai terhadap plaintif kedua kerana tidak memanggil pengerusi dan Saleem Yaqoob. Setiausaha syarikat yang mempunyai pengetahuan secara langsung sama ada pengerusi dan pengarah-pengarah telah menandatangani resolusi tersebut juga tidak dipanggil sebagai saksi. Tambahan, memandangkan mahkamah tidak dapat mencari PW2 (satu lagi pengarah defendan) sebagai saksi yang boleh dipercayai, mahkamah tidak boleh dengan pasti bergantung kepada keterangannya bahawa tandatangannya juga telah dipalsukan. Saksi pakar sepatutnya dipanggil oleh plaintif kedua untuk membantu mahkamah untuk mengenalpasti keaslian tandatangan-tandatangan pada resolusi tersebut. Walau bagaimanapun, dalam kes ini, plaintif kedua gagal untuk berbuat demikian (lihat perenggan 60–61 & 67–68).

(3) Standard pembuktian bagi dakwaan fraud di dalam prosiding sivil adalah bukti melampaui keraguan munasabah. Bukti melampaui keraguan munasabah walau bagaimanapun, tidak bermaksud bukti melampaui bayangan keraguan. Tahap pembuktian hendaklah mempunyai tahap kebarangkalian yang tinggi agar dengan keterangan yang dikemukakan, mahkamah mempercayai kewujudannya atau seorang yang waras akan mempertimbangkan kewujudannya adalah mungkin dalam keadaan kes tertentu. Jika bukti sedemikian hanya setakat satu kebarangkalian tetapi tidak sedikitpun bukan satu kemungkinan maka ia gagal untuk membuktikan melampaui keraguan munasabah. Berdasarkan keterangan yang dikemukakan, tidak dibuktikan melampaui keraguan munasabah bahawa resolusi tersebut telah dipalsukan (lihat perenggan 74–75).

(4) Defendan ketiga telah membuat representasi kepada defendan kedua sebagai mempunyai autoriti untuk bertindak bagi pihak plaintif pertama. Defendan ketiga dianggap oleh defendan kedua sebagai seseorang yang mempunyai kuasa zahir yang ketara untuk bertindak bagi pihak pengarah-pengarah plaintif pertama untuk memasukkan terma bagi perintah persetujuan tersebut. Fakta bahawa defendan ketiga tidak memberitahu defendan kedua bahawa dia tidak mempunyai autoriti tiada kaitan dengan defendan kedua, memandangkan ia merupakan perkara dalaman plaintif pertama (lihat perenggan 88–90).

(5) Kebarangkalian tandatangan pada baucar tersebut merupakan tandatangan yang asli tidak boleh diketepikan. Di bawah s 103 Akta Keterangan 1950, plaintif kedua seharusnya memanggil saksi pakar untuk membuktikan bahawa tandatangan pada baucar bukanlah kepunyaannya (lihat perenggan 95).

(6) Menurut perintah persetujuan, defendan kedua telah diberi kebenaran untuk menjual kereta dan menggunakan hasil kutipan daripada jualan untuk menyelesaikan yuran guaman yang perlu dibayar kepadanya. Justeru, defendan kedua tidak menukarkan kereta plaintif kedua (lihat perenggan 101).]

Notes

For a case on claim in conversion, see 12 *Mallal's Digest* (4th Ed, 2010 Reissue) para 93.

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 153–155.

For cases on forgery of document, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1301–1303.

For cases on forgery of signature, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 518–526.

For cases on indoor management rule in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 374–376.

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1205–1243.

Cases referred to

AGS Harta Sdn Bhd v Liew Yok Yin [2010] 1 MLJ 309, CA (refd)

Abrath v North Eastern Railway Co [1883] 11 QBD 440 (refd)

Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd (formerly known as Jupiter Synergy Sdn Bhd) [2005] 1 MLJ 333, HC (refd)

Ali Tan Sri Abdul Kadir & Ors v Simpang Empat Plantation Sdn Bhd [2008] 5 CLJ 305, FC (refd)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC; [2007] 2 CLJ 1 (refd)

CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 8 MLJ 607; [2010] 3 AMR 194, HC (refd)

Cheong Cheng Onn v K & N Kenanga Bhd [2010] 10 CLJ 78, HC (refd)

Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34, SC; [1985] 1 LNS 134 (refd)

Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236; [1967] 1 LNS 65 (refd)

Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23; [1990] 2 CLJ 48 (Rep), HC (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86 FC; [1980] 1 LNS 31, FC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Karam Singh v Public Prosecutor [1967] 2 MLJ 25; [1967] 1 LNS 65, FC (refd)

Lee Cheong Fah v Soo Man Yoh [1996] 2 MLJ 627, HC; [1996] 2 BLJ 356 (refd)

A *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, SC (refd)
Mayban Factoring Bhd v Koperasi Pekerja-Pekerja Jabatan Perdana Menteri Malaysia Bhd [2001] 4 MLJ 337, CA (refd)
Moorgate Merchantile Co Ltd v Firen and Another [1962] 2 All ER 467 (refd)
Ng Teck Peng v Fimaco Sdn Bhd & 2 Ors [2009] 1 LNS 1685, HC (refd)
B *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136; [1980] 1 LNS 55, FC (refd)
Re Bramblevale Ltd [1970] Ch 128 (refd)
Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors [1994] 4 MLJ 464, HC (refd)
C *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505; [2006] 3 CLJ 93, FC (refd)
Saminathan v Pappa [1981] 1 MLJ 121, PC; [1980] 1 LNS 174 (refd)
Selvaduray v Chinniah [1939] MLJ 253 CA; [1939] 1 LNS 107 (refd)
D *Syarikat Wing Heong Meat Product Sdn Bhd v Wing Heong Food Industries Sdn Bhd & Ors* [2010] 7 MLJ 504, HC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh [2001] 5 MLJ 317; [2003] 4 CLJ 859, HC (refd)
E *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC (refd)
Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known As Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

F **Legislation referred to**
Companies Act 1965
Evidence Act 1950 ss 73, 101, 102, 103
Penal Code
Rules of the High Court 1980 O 15 r 5

G
PS Gill (Gill & Tang) for the plaintiffs.
S Surendran (Kadir Andri & Partners) for the first defendant.

Hanipah Farikullah JC:

H

[1] The first plaintiff is a private limited company incorporated under the Companies Act 1965 and having a registered office at Suit 11.04–11.05, Level 11, Wisma Goldhill, 67 Jalan Raja Chulan 50200 Kuala Lumpur.

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[2] This action was commenced on 20 December 2001. Subsequently the first plaintiff was wound-up by an order of the court dated 10 January 2002 and a private liquidator Mr Tee Siew Kei ('the liquidator') were appointed by the court.

[3] The second plaintiff was a former director of the first plaintiff and a citizen of the Republic of Pakistan.

[4] On 20 April 2001 the first defendant was appointed as the receiver and manager of the first plaintiff upon defaults of three debentures two of which was created in favour of Malayan Banking and the third in favour of Standard Chartered Bank Bhd.

[5] The second defendant is a firm of solicitors whose address of service is Messrs RR Mahendran & Co, Advocates and Solicitors, No 66–A Jalan Tan Hiok Nee, 8000 Johor Bahru.

[6] The third defendant was the senior general manager of the first plaintiff. He is also a citizen of the Republic of Pakistan.

THE FIRST PLAINTIFF'S CLAIMS

[7] On 27 June 2001, the first defendant as the receiver and manager of the first plaintiff commenced proceedings in the High Court of Malaya vide Originating Summons No D-24–169 of 2001 against the first plaintiff ('the proceedings') to prevent the directors and officers of the first plaintiff from interfering with the management and assets of the company.

[8] On 10 July 2001, the second defendant entered an appearance on behalf of the first plaintiff.

[9] To resolve the dispute of the proceedings, on 2 August 2001 the second defendant acting through its partner Mr RR Mahendran, entered into a consent order on behalf of the first plaintiff with the first defendant. The consent order, inter alia, contained the following terms:

> Bahawa Tetuan RR Mahendran & Co dibenarkan untuk menjual kenderaan bermotor nombor pendaftaran WFC 2813 jenis Mercedes-Benz- S320L dan menggunakan hasil penjualan kenderaan tersebut untuk menyelesaikan kos-kos Tetuan RR Mahendran & Co dan Plaintif tidak mempunyai apa-apa bantahan terhadap penjualan ini atas akujanji peguamcara Defendan bahawa kenderaan tersebut adalah kepunyaan Encik Waseem Yaqoob s/o Sheikh Muhammad Yaacob.

[10] The plaintiffs aver that in entering the consent order, the second defendant acted without authority and consent of the first plaintiff. Further, the plaintiffs pleaded that the board's resolution of the first plaintiff dated 2 May 2001 ('the resolution') purportedly appointing the second defendant as their solicitors was not a resolution of the first plaintiff and is a forgery because the directors never signed the resolution.

THE SECOND PLAINTIFF'S CLAIMS

[11] The second plaintiff was at the material time the registered owner of a Mercedes Benz Model S320L bearing registration No WFC 2813.

[12] The second plaintiff claims that notwithstanding the fact that his car was not the subject matter of the proceedings and he was not a party to it, his car had wrongfully been made the subject matter of the consent order. Further, the second plaintiff contends that on 18 July 2001, his car was unlawfully appropriated by the second defendant and he had suffered losses and damages. Therefore the second plaintiff prays for an order that the car be returned by the second defendant to him or alternatively the second defendant pays the costs of the car.

[13] The second plaintiff's claims have been denied by the second defendant on the ground that the second plaintiff as agent of the first plaintiff had agreed vide a payment voucher dated 11 July 2001 (p 49 NAD) to transfer his car to the second defendant for the settlement of the legal fees of RM250,000 owed by the second plaintiff in respect of cases in the High Court Johor Bahru and Kuala Lumpur. However in his reply to the second defendant's defence, the second plaintiff denied signing the voucher and alleged that his signature was forged on the voucher.

[14] The second defendant also avers that by virtue of the first plaintiff's resolution, it has the authority to act on behalf of the first plaintiff in entering the consent order and that the consent order was entered pursuant to the instructions of the third defendant, who was at the material time, the senior general manager and agent of the first plaintiff.

PRELIMINARY ISSUES

[15] The trial of this suit commenced on 20 May 2010 by all the plaintiffs against the defendants. At the outset of the trial, learned counsel for the first defendant raised a preliminary objection that since the first plaintiff has been wound up and the liquidator has not given consent for the first plaintiff to continue with this proceedings, this action should be struck out in view of the fact that leave has not been obtained from the court. Learned counsel for the first defendant has cited the Federal Court's decision in *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 to support his submission.

[16] Further, the court was informed by learned counsel for the liquidator that the liquidator was prepared to give consent for the first plaintiff to

continue with this proceedings but the parties were not able to agree with the term imposed by the liquidator for a sum of RM150,000 to be deposited with the company to off-set any expenses that may be incurred or ordered from this proceedings or any proceedings that may arise thereafter. The court was also informed that it is not erroneous for the liquidator to ask for security as the directors of the first plaintiff are all foreigners.

[17] On the other hand, learned counsel for the plaintiff, inter alia, argued that consent of the liquidator is not required since this action was commenced by the directors using their residual powers as directors and as shareholders. He cited the Federal Court's decision in *Ali Tan Sri Abdul Kadir & Ors v Simpang Empat Plantation Sdn Bhd* [2008] 5 CLJ 305 to support his argument.

[18] The issue before the court is whether in the absence of consent from the liquidator, leave of the court is necessary before the first plaintiff can continue with his actions against the defendants.

[19] In the case of *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd (formerly known as Jupiter Synergy Sdn Bhd)* [2005] 1 MLJ 333, Ramly Ali JC (now JCA) held that:

> It is trite that upon the compulsory liquidation of a company, the appointed liquidator displaces the directors of the company and the control of the activities of the company are then vested with the liquidator. Following therefrom when the company is in liquidation, the control as to whether an action should or should not be initiated by the company is also vested in the liquidator, (see: *Russel & Anor v Westpac Banking Corporation & Ors* (1994) 12 ACLC 278; *Yates v City Loan & Credit Corp Pty Ltd* (1988) 6 ACLC 219).
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> Accordingly, if a contributory of the company is of the opinion that there is a valid cause of action available to the company for which a suit or action ought to be brought in the name of the company that contributory must place this before the liquidator for his consideration. If for whatever reason, the liquidator is unwilling to initiate the action in the name of the company, it is still available to that contributory to apply to the court under s 279 of the Companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the company or that leave be given to the contributory himself to bring the action in the name of the company. Section 279 of the Companies Act 1965 provides as follows:
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> Appeal against decision of liquidator
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> Any person aggrieved by any act or decision of the liquidator may apply to the court which may confirm reverse or modify the act or decision complained of and make such order as it thinks just.

[20] In the case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd* the

issue that the Federal Court has to consider is whether the liquidator has to obtain leave of the court to appoint an advocate and solicitors to conduct the litigation. In discussing the powers of the liquidator Gopal Sri Ram FJ (as he then was) speaking for the Federal Court said at p 756 (MLJ); p 795 (CLJ):

> What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company.
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> In *Russell v Westpac Banking* 13 ACSR 5, King CJ when delivering the judgment of the Full Court of South Australia said:
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> When the company is in liquidation, the person in whom is vested the authority to institute proceedings, is the liquidator: *Scarel Pty Ltd v City Loan & Credit Corporation Pty Ltd* (1988) 12 ACLR 730. There is power, however, in the court to authorise other persons to conduct litigation in the name of the company: *Cape Breton Company v Fenn* (1881) 17 Ch D 198; *Aliprandi v Griffith Ventures Pty Ltd* (1991) 6 ACSR 250.
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> Of course, resort to the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question. The only issue is whether it is competent for the liquidator to authorise a former director of the company in liquidation to use the company's name to commence, continue or defend proceedings. The answer to that question was provided by Cotton LJ in *Cape Breton Company v Fenn* (1881) 17 Ch D 198 as follows:
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> ... prima facie proceedings in the name of the company ought to be conducted by the liquidator-an officer appointed by the court and subject to the supervision of the court. There may be, no doubt, special cases where, although the court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is improper, it may give power to other persons to conduct the litigation upon their giving proper indemnity against any consequences of that litigation. But who are the persons who can be authorized to take these steps? In my opinion the creditors and the contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty. They have a right in special cases to ask the court for leave to do that which the liquidator is advised not to do, or which, because he has no funds, he does not do, viz, take proceedings in the name of the company, but in my opinion the power of the court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation.

[21] Based on the facts of the present case and the authorities cited above, I am of the view that leave of the court should have been obtained before the first plaintiff continue with the actions against the defendants. In the absence of such order, the first plaintiff's action against the first defendant was struck out by the court and a cost was awarded to the first defendant to be taxed. In view of the court's decision, the learned counsel for the plaintiffs requested for a trial date for the second defendant, the matter having been withdrawn against the first defendant.

ISSUES

[22] In disposing the second plaintiff's claim against the second defendant, the issues requiring determination are as follows:

(i) Whether the Board's resolution dated 2 May 2001 was a forged document.

(ii) Whether the second defendant was authorised by the first plaintiff to enter the consent order dated 2 August 2001.

(iii) Whether the payment voucher was a forged document.

[23] It is not disputed between the parties that the second defendant entered the consent order on 2 August 2001 in respect of Suit No D5–24–169 of 2001. However, what is disputed by the second plaintiff is that the second defendant was not authorised to enter the consent order on behalf of the first plaintiff because the resolution which purportedly authorised the second defendant to enter the consent order is void and of no effect.

[24] The second plaintiff contents that the resolution was null and void and of no effect is based on the premise that it was not signed by the directors of the company. According to the second plaintiff the signatures of the directors were forged.

EVIDENCE OF PW1, MUHAMMAD SALEM QADRI

[25] The second plaintiff called two witnesses to prove his claims. The first is Muhammad Salem Qadri ('PW1') a citizen of the Republic of Pakistan but now residing in Malaysia. PW1 was at the material time a business and finance manager of the first plaintiff.

[26] According to PW1, the resolution dated 2 May 2001 which purportedly authorised the appointment of the second defendant to act as solicitors for the first plaintiff is forged and it was never signed by the directors. He testified that the signature of Saleem Yaqoob s/o Sheikh Muhammad

Yaqoob one the directors of the first plaintiff, did not appear on the resolution and he did not know why his (Saleem's) signature was not there.

[27] In cross-examination, PW1 admitted that he discovered the resolution was forged sometime in November 2001. He testified that the resolution was forged was based on what was told to him by the directors of the first plaintiff and also by the first plaintiff's new solicitors Messrs Puthucheary Firoz Asmet & Mai ('Messrs Puthucheary').

[28] With regards to the appointment of the second defendant as the solicitors for the first plaintiff, PW1 explained that, earlier the second defendant becomes the lawyer for the first plaintiff through Izhar Ul Ahsan ('the third defendant'). He also agreed in cross-examination that before the consent order was entered, the second defendant was appointed by the first plaintiff to defend the various suits by or against the company.

[29] Further in examination-in-chief, PW1 testified that on the day the second defendant took the second plaintiff's car forcibly on 18 June 2001, Sheikh Muhammad Yaqoob, the chairman of the first plaintiff called him from Pakistan to remove the second defendant as the first plaintiff's solicitors and to find new solicitors for the first plaintiff. He was also asked by the chairman to deal with the legal matters of the company instead of the third defendant.

[30] PW1 testified that the chairman informed him that he did not authorise the second defendant to enter the consent order. According to PW1, after the car was taken by the second defendant, the chairman was not speaking or giving directives to the third defendant any longer.

[31] PW1 confirmed in cross-examination that at the material time when the second defendant was acting for the first plaintiff, he had no role whatsoever in the management of the legal affairs of the company. He said that he was only involved in the legal affairs of the first plaintiff sometime in November 2001.

[32] In cross-examination PW1 explained that it was only around October 2001, that Messrs Puthucheary was appointed as the new solicitors for the first plaintiff. PW1 explained that a new lawyer to replace the second defendant was not appointed earlier because he had no authority to do so.

[33] PW1 confirmed in cross-examination that the third defendant is the only person authorised by the directors to appoint solicitors for the company and to give instructions to the second defendant pertaining to all legal matters of the first plaintiff. He further agreed that at the material time all instructions from the directors will only be given to the third defendant and the instructions

are all verbally and never in writing. PW1 admitted that when the directors left for Pakistan around July 2001, all directions relating to the legal matters of the company were given by the directors through the third defendant.

[34] PW1 stated in cross-examination that after the car was taken by the second defendant on 18 June 2001, neither he nor the directors gave any instruction to the second defendant not to act as the company's solicitors.

[35] To a question by his counsel whether it could be the negligence of the third defendant of not getting proper instructions from the directors in instructing the second defendant to enter the consent order, this is what PW1 said in his evidence:

> It was not his only negligence but he had bad intention also about the Company which proof when he went back to Pakistan, he does not have any relations with the Directors.

EVIDENCE OF PW2, MUHAMMAD NAEEM S/O ABDUL RASHED

[36] The second witness for the second plaintiff is Muhammad Naeem s/o Abdul Rashed ('PW2'), who is a director and a shareholder of the first plaintiff since 1994. He is also the uncle of the second plaintiff.

[37] PW2 informed the court that he had been duly authorized in writing by the second plaintiff to represent him in this proceeding ('exh P16').

[38] PW2 confirmed that the other directors of the first plaintiff is Saleem Yaqoob s/o Sheikh Muhammad Yaqoob who holds all the shares except for the two shares hold by him. The other director is Sheikh Muhammad Yaqoob who is also the chairman of the first plaintiff and according to PW2, the ultimate controller of the company.

[39] With regards to the signatures on the resolution, PW2 gave evidence to the court that he never signed the alleged resolution and his signature thereon is a forgery. Similarly, PW2 said that the chairman's signature on the purported resolution is also a forged and according to him, the chairman has confirmed that to him.

[40] PW2 admitted that after discovering that the resolution was forged, he did not lodge any police report. No explanation was given in evidence as to why the police report was not made.

[41] PW2 testified that on 9 March 2001 the directors have passed a resolution ('exh P11') appointing Messrs Gunapathy to act for the first plaintiff

in the various suits filed by and against the company and the second defendant was merely assisting Messrs Gunapathy.

[42] In examination-in-chief, PW2 also said that he had asked the third defendant to instruct Gunapathy to deal with the legal matters facing the company. PW2 said that subsequently, the third defendant informed him that Gunapathy was the first plaintiff's solicitors and he (Gunapathy) had asked the second defendant to assist him as counsel.

[43] PW2 confirmed that he never communicates with the second defendant directly and all communications with the second defendant was done through the third defendant because the chairman and he have difficulty in communicating in English.

[44] PW2 informed the court that on 22 June 2007 he had left for Pakistan. While in Pakistan he was informed by the third defendant that the second defendant had entered an appearance on behalf of the first plaintiff on 14 July 2001 in respect of Kuala Lumpur High Court Suit No D7–22–119 of 2001. PW2 said that he was never informed by the third defendant that the second defendant was to act for the first plaintiff. According to him, the instruction is for the second defendant to assist Messrs Gunapathy only.

[45] Further, PW2 testified that on the evening of 18 July 2001, he received a telephone call from Tika Khan the first plaintiff's quality control manager who was residing at the Country Heights home of the second plaintiff and the chairman. He said that Tika Khan informed him that the second defendant came to the house earlier that day and insisted that he was the first plaintiff's lawyer and forcibly took the keys to the two Mercedes Benz one of which belonged to the second plaintiff. PW2 said that the chairman had also told him that he had asked PW1 to lodge a police report of what had happened since the first plaintiff never appointed the second defendant as their lawyer. Reference was made by PW2 to the police report that was lodged by Tika Khan (p10 NAD).

[46] PW2 also testified that he was not aware that notice of change of solicitors had been filed by the second defendant on 13 July 2001 (p22–23 NAD) to replace Messrs Gunapathy and according to him the directors never authorised it. Further he explained that after the police report had been lodged by Tika Khan, he tried to call the third defendant but he could not be contacted.

[47] Subsequently, PW2 said he called the third defendant to find out what had happened and the third defendant told him that he only took instructions from third defendant and not to speak to him again.

[48] According to PW2, on 20 July 2001 the chairman sent a letter to the third defendant ('exh P12') telling him that he was shocked as to what had happened and that the second defendant had taken away both cars by force and told him that he had no authority to act on any of the company matters and does not want the second defendant as their solicitors. The chairman also did not want the third defendant to do anything further for them and he will find another lawyer.

[49] Subsequently according to PW2, he discovered that the second defendant had exhibited the alleged payment voucher dated 11 July 2001 (p 49 NAD) to show that the second plaintiff had actually signed the voucher whereby he agreed to transfer the car as part payment of the legal fees due to the second defendant. PW2 testified that the second plaintiff denies signing any such receipt. PW2 reiterated that he knew the second plaintiff's signature and what appeared in the voucher is not the second defendant's signature and is clearly a forgery.

[50] To a question whether the third defendant instructed the second defendant to enter the consent order, this is what he said:

> He was never our Solicitors since we had only appointed Messrs Gunapathy to be our Solicitors. After what Mahendran had done on the 18.7.2001 any authority that the third defendant had to give or pass on my instructions to the solicitorss was terminated and he was no longer employed by the company and was no longer authorized to do anything for the first plaintiff.

[51] Further, PW2 testified that the third defendant was not authorised to file the affidavit dated 26 December 2001 on behalf of the first plaintiff (at p 58–72 NAD). According to him, since 20 July 2001 after the letter was sent by the chairman, the third defendant was removed from his employment with the first plaintiff and had no authority whatsoever to give any instruction to anyone. PW2 in his evidence said that the directors were not aware that a consent order was entered until October 2001 when they were informed by their new solicitors, Messrs Puthucheary.

EVALUATION OF EVIDENCE AND FINDINGS

[52] The court has carefully considered all the evidence adduced by the second plaintiff in this suit together with the documentary evidence submitted to the court and the written submission of learned counsel for the second plaintiff. The court did not have the opportunity to hear the second defendant's case, as the court had earlier made an order to dispense with the legal representation of the estate of the second defendant under O15 r 5 of the Rules

of the High Court 1980 for the purpose of the trial.

Whether the Board's Resolution is forged

[53] As the court may recall, the plaintiff is disputing that the second defendant was authorised to enter the consent order on its behalf. The second plaintiff's contention is based on the premise that the resolution was null and void because it was not signed by the directors of the company. According to the second plaintiff the signatures of the directors were forged.

[54] The court notes that on 2 May 2001 the Board of the first plaintiff resolves as follows:

(i) M/s RR Mahendran & Co, Advocates & Solicitors, of No 66–A Jalan Tan Hiok Nee, 80000 Johor Baru and/or M/s Gunapathy Suppiah & Co, Advocates and Solicitors of first Floor, Wisma Gunapathy, No 8 Jalan Makmur, 81000 Kulai, Johor be and are hereby appointed the company's solicitorss to act as solicitors in legal matters pertaining to the company.

(ii) M/s RR Mahendran & Co, and/or M/s Gunapathy Suppiah & Co, are hereby instructed to take all necessary and relevant instructions of either Mr Mohammed Naeem or Mr Izhar Ul Ahsan and all such action as is necessary and relevant taken affirmed and ratified by the company if such action is taken on the instruction of either Mr Mohammed Naeem or Mr Izhar Ul Ahsan.

(iii) All matters regarding M/s RR Mahendran & Co, and or M/s Gunapathy Suppiah & Co, cost and disbursement shall be decided by the company whose decision shall be final.

(iv) This appointment (of M/s RR Mahendran & Co, and/or M/s Gunapathy Suppiah & Co,) is a temporary appointment and may be terminated at any time at the sole discretion of the company.

(v) All previous Resolutions on the appointment of solicitorss are hereby amended accordingly.

[55] It is noted that in essence the first plaintiff had agreed to appoint the second defendant and/or Messrs Gunapathy Suppiah & Co as solicitors in respect of legal matters pertaining to the company and that the second defendant is instructed to take all instructions from either PW2 or the third defendant.

[56] In this case, PW1 testified that the resolution dated 2 May 2001 was a fraudulent document because Saleem Yaqoob s/o Sheikh Muhammad Yaqoob, a director of the first plaintiff told him that he never signed the resolution and that his signature on the document is a forgery. PW1 also said that the chairman told him that he too did not sign the resolution.

[57] The court notes that no evidence was adduced by the second plaintiff as to who had signed the resolution since the chairman, Saleem Yaqoob or PW2 has signed the resolution.

[58] Sheikh Muhammad Yaqoob (the chairman) and Saleem Yaqoob would be relevant witnesses to testify that the signatures on the resolution was not theirs. In the present case, the second plaintiff has failed to produce the chairman or Saleem Yaqoob to tender evidence in support of the allegation that their signatures have been forged.

[59] In the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1which was followed by the courts in the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh* [2001] 5 MLJ 317; [2003] 4 CLJ 859and in *CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 8 MLJ 607; [2010] 3 AMR 194, the Court of Appeal held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Bashir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Bashir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered …

[60] In the light of the authorities cited above the court finds that since it is the second plaintiff who have alleged that the chairman or Saleem Yaqoob did not signed the resolution, it is thus incumbent upon the second plaintiff to call them as witnesses to testify as to whether they signed the resolution. The court finds that an adverse inference can be invoked against the second plaintiff for not calling the chairman or Saleem Yaqoob.

[61] As I could see it, one person who could have thrown light as to whether the first plaintiff has passed the resolution is the company secretary at the material time. The company secretary duties would include attending Board meetings and taking down and finalising board minutes. The draft of the resolution would be sent to the chairman and the relevant directors for their confirmation and signatures. The company secretary at the material times would have direct knowledge as to whether the chairman and the directors had signed the resolution. However the company secretary was also not called as witness by the plaintiff and no reason at all were given.

[62] PW2 also testified that he never signed the resolution dated 2 May 2001 and that his signature too was forged on the document. In this case PW2 had tendered few documents ('exhs P19(A)' to '19(G)') to support his contention

that the signature on the resolution ('the purported signature') is not the same as his signatures in exhs P19(A) to 19(G) ('admitted signatures').

[63] As this court is competent to do so by virtue of s 73 or the Evidence Act 1950, the admitted signatures of PW2 was compared with his purported signature to ascertain whether the purported signature on the resolution and the admitted signatures were indeed of PW2.

[64] After careful perusal, this court is of the opinion that the purported signature bears some similarity with the admitted signatures. On all the documents tendered for comparison, ie exh P17(A) to (G), the court observes that there is a gradual hook on all the alphabet 'M' and on all the signatures tendered for comparison. The next is that there is a strong stress on the capital 'N' to be given to the word 'Naeem'. Therefore the court finds that the signature on the Board's resolution dated 2 August 2001 could be that of PW2. The court also notes that there are some variations between the purported signature and the admitted signature particularly relating for the alphabet 'M' at the end of the word 'Naeem'. However, in my view, natural variations may occur in any signature.

[65] However with regret, by visual comparison the court is not able to make a conclusive finding that the purported signature of PW2 on the resolution was not his signature.

[66] In the case of *Asean Security Peper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 CLJ 1 the Federal Court had to consider the issue of fraud regarding an insurance claim by the appellant against the respondent under a fire insurance policy. The Federal Court referred to Lord Denning MR decision in the case of *Re Bramblevale Ltd* [1970] Ch 128 and said at p 137:

> Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.

[67] In any event, since I am not able to find PW2 as a trustworthy witness, the court cannot safely rely on his evidence that his signature was forged. There are few material contradictions in the evidence of PW2. Firstly, with regards to the appointment of the second defendant as the first plaintiff's solicitors, PW2 initially said during examination-in-chief that all the legal matters of the first plaintiff was handled by Messrs Gunapathy and the plaintiffs never appointed the second defendant as their lawyer. However in the course of the examination-in-chief, he said that the second defendant was merely assisting Messrs Gunapathy. The other material contradiction is in relation to the instructions to be given to the second defendant. In this respect, PW2 said that all communications with Messrs Gunapathy or the second defendant was only

done through the third defendant as he is not fluent in English. However later PW2 gave evidence that Messrs Gunapathy is to take instruction either from him or the third defendant.

[68] I am of the view that an expert witness should have been called by the second plaintiff to assist the court in verifying the authenticity of signatures on the resolution. However in this case the second plaintiff failed to do so.

[69] In the case of *Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors* [1994] 4 MLJ 464, the respondent alleged that the signature on the marriage certificate was not that of the deceased. The court in that case after comparing the signature of the deceased on the marriage certificate with various signatures of the deceased on other documents arrived at the conclusion that the purported signature of the deceased on the marriage certificate could not be of the deceased. The basis of the court's decision is explained below:

> For comparison of the deceased's signature under s 73(1) of the Evidence Act 1950, various signatures of the deceased found in four of her previous passports (exhs D10A–D), an insurance indemnity form (exh D9) and a power of attorney (exh P6) which she gave to the petitioner were used by this court. After careful perusal, this court is of the opinion that the signature purported to be that of the deceased in exhibit P1 could not have been that of the deceased. On all the documents accepted by the parties for comparison, ie exhs D10A–D, D9 and P6, there is a strong stress on the capital letter 'C' to begin the word 'Chong'. This emphasis is so prominent that a tail is attached to the alphabet C as can be seen in exhs D10A, D, C and D9. In exh P1, there is no emphasis whatsoever at the beginning of this letter 'C'. The next is the alphabet 'g' which has a gradual hook on all the signatures tendered for comparison, whilst on exh P1 this hook is of a most irregular nature.

[70] The Court of Appeal in the case of *AGS Harta Sdn Bhd v Liew Yok Yin* [2010] 1 MLJ 309 had to consider the authenticity of the plaintiff's signature. In that case, His Lordship Dato' Raus Sharif (JCA) speaking for the Court of Appeal held that there was no necessity to call the handwriting expert because there are more than sufficient evidence to support the learned judge findings that the plaintiff had never signed the sale and purchase agreement.

[71] However the court finds that the above cases can be distinguished from this present case. In this case, since the court is unable to make a conclusive finding that the purported signature of PW2 is the same as his admitted signatures, it is my view that it would be necessary for the second plaintiff to call an expert evidence to assist the court in verifying the signature of PW2. However this was not done.

[72] The court also finds that when the directors including PW2 were aware of the alleged resolution sometime in November 2001, then why was then no police report made by the second plaintiff or any of the directors for fraud. The court also notes that no police report was also lodged against the second defendant for entering the consent order without the alleged authority of the directors of the first plaintiff.

[73] To allege forgery is to make a serious allegation. Forgery is a serious crime under the Penal Code. Yet the second plaintiff did not see it necessary for it to make a police report against the second defendant, if he genuinely believe as a forgery has taken place (see *Cheong Cheng Onn v K & N Kenanga Bhd* [2010] 10 CLJ 78).

[74] The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case. (*PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 (FC); [1980] 1 LNS 55). The standard of proof for an allegation of fraud in civil proceedings is that of proof beyond reasonable doubt (*Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174; *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371; and *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; [1990] 2 CLJ 48 (Rep); *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 FC; [2007] 2 CLJ 1; *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 FC). Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see *Chu Choon Moi v Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 at p 38 (SC); *Lee Cheong Fah v Soo Man Yoh* [1996] 2 MLJ 627; [1996] 2 BLJ 356; *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 2 CLJ 48 (Rep); [1990] 3 MLJ 23).

[75] Therefore based on all the evidence adduced and applying the above authorities to the present case it is not right for this court to hold that the resolution was forged was proved beyond reasonable doubt.

Whether the second defendant was authorised to enter the consent order

[76] Having said that the resolution was not forged, the court will next deal with the issue as to whether the second defendant was not authorised by the first plaintiff to enter the consent order as alleged by the second plaintiff. In this case, the second plaintiff wishes the court to believe in the existence of a

particular fact — that the second defendant was never the first plaintiff's solicitors and he was never authorised to enter the consent order on behalf of the first plaintiff.

[77] In law the burden of proof as to any particulars fact lies on the party who wishes to make the court believe in its existence. (Section 103 of the Evidence Act 1950, *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65). There is no burden on the opposing party to disapprove it (*Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236; [1967] 1 LNS 65). In the case of *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 Augustine Paul JC (as he then was) said as follows:

> If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail him to turn round and say that the respondent has not established his. In such circumstances, as the Privy Council observed in *Raja Chandranath Roy v Ramjai Mazumdar* 6 BLR 303, the respondent can say: 'It is wholly immaterial whether I prove my case or not. You have not proved yours.' (see *Selvaduray v Chinniah* [1939] MLJ 253).

[78] Based on the above authorities, the court is of the view that in this case, it is the duty of the second plaintiff to produce the necessary evidence to proof his allegation. The contention of the learned counsel for the second plaintiff's that the burden of proof lies with the second defendant is therefore misconceived.

[79] The court recalls that PW1 testified that the first plaintiff did not ask the second defendant to enter into the consent order. However in cross-examination, PW1 admitted that the third defendant had directed the second defendant to enter the consent order. PW1 also confirmed is cross-examination that the second defendant had been defending on all the actions for or against the company. According to PW1 and PW2, the third defendant is the only person who has been instructing the second defendant then.

[80] PW1 admitted in cross-examination that all instructions to the second defendant will be given by the directors through the third defendant only and was all done verbally and never in writing.

[81] The third defendant in his statement of defence had pleaded, inter alia, that the resolution dated 2 May 2001 was valid and that he, the third defendant has given instructions to the second defendant to enter consent order. By an affidavit dated 26 December 2001 (refer to pp 52–55 NAD) in respect of the first defendant's application ('encl 6') for an injunction to refrain the first defendant or its agents from dealing or disposing with the first plaintiff's assets,

the third defendant affirmed that he had given instructions to the second defendant to enter the consent order. The relevant paragraphs of third defendant's affidavit states as follows:

> 5: saya adalah wakil sah kepada Plaintiff pertama sehingga hari ini mengikut resolusi Plaintif Pertama bertarikh 2/5/2001.
>
> Sesalinan Resolusi bertarikh 2/5/2001 dilampirkan bersama-sama di sini dan ditandakan sebagai Eksibit IUA-1.
>
> 6: Saya telah memberi arahan ketara kepada Defendan kedua untuk merekodkan terma-terma 1, 2, 3, 6, 7 dan 8 dalam Penghakiman Persetujuan 2/8/2001 dalam kes Saman Pemula No D5-24-169-2001 dalam Mahkamah Tinggi Kuala Lumpur iaitu Eksibit SY-2 dalam afidavit Saleem tersebut.

[82] In cross-examination, PW1 also confirmed that prior to the filing of this suit by the plaintiffs, the second defendant was still acting for the first plaintiff and that the third defendant was aware of the actions that the second defendant was taking in relation to the company.

[83] PW1 also confirmed in cross-examination that a new lawyer was not appointed for the company until November 2001. PW1 also admitted in cross-examination that the third defendant had given instructions to the second defendant to enter into the consent order on 2 August 2001. However PW2 clarified that the third defendant acted on his own without getting instruction from the directors in Pakistan.

[84] PW1 also agreed that after finding that the second defendant had entered the consent order, none of the directors objected in writing to the actions taken by the second defendant. The court also notes that no police report was lodged against the second was lodged against the second defendant or the third defendant in respect of the consent order. No explanation was provided to the court why this was not done.

[85] Further the court finds that on 13 July 2001, the second defendant had filed a notice of change of solicitors from Mesrs Gunapathy Suppiah to 'Tetuan RR Mahendran & Co' (the second defendant) (p 22 NAD). The said letter was extended by the second defendant to Messrs Gunapathy Suppiah & Co. There is no shred of evidence submitted by the second plaintiff to show that there was any objection by Messrs Gunapathy pertaining to the action of the second defendant. It is unbelievable that Messrs Gunapathy would not have objected to the change of solicitors by the second defendant if he is still the solicitors for the first plaintiff as alleged by PW2 in his evidence.

[86] Now back to the issue of the burden of proof, even assuming that I am wrong in holding that the legal burden is on the plaintiff to prove that the

resolution was a forged document, in my judgment based on the totality of the evidence adduced, I have found that on the balance of probabilities the second plaintiffs has failed to prove that the second defendant was not authorised to enter the consent order.

[87] The court finds that on the totality of evidence adduced the second defendant entered the consent order upon the directions of the third defendant. PW1 and PW2 confirmed that the directors gave directions in matters relating to the legal affairs of the company only through the third defendant and all the directions were given verbally and never in writing. Further, PW1 and PW2 also confirmed that the directors never communicated directly with the second defendant. The third defendant also confirmed in his affidavit to the court (pp 52–55 NAD) that he is the agent of the first plaintiff. The court finds that even though PW2 in his evidence informed the court that vide a letter dated 20 July 2001 ('exh P12') the chairman had written to the third defendant terminating his service, it is noted that no evidence was submitted by the second plaintiff to proof that the letter was actually faxed to the third defendant. Therefore based on the evidence adduced the court finds that at the time when the consent order was entered, the third defendant is the agent of the first plaintiff. In the case of *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, the court held that the appointment of an agent need not be in writing and the existence of a relationship of principal and agent can be inferred from the circumstances of the case.

[88] In the present case, the court finds that based on the evidence adduced, on the balance of probabilities, indicates that the conduct of the directors took the form of leaving to the third defendant (the senior general manager of the first plaintiff) the sole responsibility and conduct of managing the legal affairs of the company. PW1 and PW2 in evidence confirmed this. By the said conduct, the court finds that the third defendant represented to the second defendant as a person who has authority to act on behalf of the first plaintiff.

[89] The court is of the view that based on the facts of this case the third defendant was expected and was perceived by the second defendant as person with the apparent ostensible authority to act on behalf of the directors of the first plaintiff to enter the terms of the consent order. (*Syarikat Wing Heong Meat Product Sdn Bhd v Wing Heong Food Industries Sdn Bhd & Ors* [2010] 7 MLJ 504 followed).

[90] The fact that the third defendant did not inform the second defendant that he had no authority was not the concern of the second defendant, it being an internal matter of the first plaintiff. If at all there was any misrepresentation made or fraud committed by the third defendant acting in the cause of the first plaintiff business, the third defendant should be liable for acting beyond his

authority. In the case of *Mayban Factoring Bhd v Koperasi Pekerja-Pekerja Jabatan Perdana Menteri Malaysia Bhd* [2001] 4 MLJ 337 the Court of Appeal held that:

> In all those instances, it cannot be denied that he was acting on behalf of the respondent. The fact that he did not inform the respondent of the transactions is not the concern of the appellant, it being an internal matter of the respondent. The respondent admitted that it has had dealings previously with Mejamok who was its appointed agent in the supply of mineral pots. Hence, Mejamok was not a total stranger to the respondent. If at all there was any misrepresentation made, or fraud committed by the secretary acting in the course of the respondent's business, under s 191 of the Act, the conduct is imputed on the respondent. In the circumstances, the respondent cannot escape the liability to the appellant, an innocent party, in respect of the debts which arose out of the factoring agreement made with notice, though not communicated to it by its authorised agent. As stated earlier, the appellant is not concerned with the internal affairs involving the respondent and its secretary. At the very least, on the facts, the appellant was entitled to rely on the ostensible authority of the secretary to act on behalf of the respondent. As far as the appellant is concerned, its right over the respondent was created by the factoring agreement, the notice of which was properly given to it.

[91] The court finds that pursuant to the directions of the third defendant, the second defendant entered into the consent order subject to the terms, inter alia, allowing the second defendant to sell the second plaintiff's car bearing registration number WFC 2813 and to use the proceeds of the sale of the said car for the settlement of the legal fees due to the second plaintiff.

[92] Based on the above, the second defendant has not unlawfully sold the car. It was sold pursuant to an order of the court dated 2 August 2001.

Whether the payment voucher was a forged document

[93] Further, the court notes that prior to the consent order on 11 July 2007 the second defendant had issued a payment voucher of RM250,000 in favour of the second plaintiff as part payment of his legal fees (p 49 NAD). The voucher, inter alia, states as follows:

> I Wassem Yaqoob (Passport Pakistan No F020207) hereby Agree TO TRANSFER M/CAR NO: WFC 2813 TO RR MAHENDRA TO CONTRA RM250 000 PART PAYMENT OF THE ABOVE CASES.

[94] However PW1 in his evidence said that the second plaintiff denies signing any such receipt. Further, he said he knew the second plaintiff signature and according to him what appears in the voucher is definitely not the second plaintiff's signature and is a forgery. PW2 tendered the original grant of the

second plaintiff's car ('exh P15') for the court to compare the second plaintiff's signature on the grant and on the said voucher. A

[95] As stated earlier, this court is competent to do so (s 73 of the Evidence Act 1950), the signature of the second plaintiff on exh P15 was compared with his signature on the payment voucher in order to ascertain whether the second plaintiff indeed signed the said voucher. The court finds that there is some similarity and no substantive variations between the signature on the grant and on the voucher by visual comparison alone the court cannot conclusively determine whether the signature on the payment voucher is not that of the second plaintiff. In this respect, the court finds that the probability of the signature on the voucher having been a genuine signature cannot be ruled out. In this case, it was not possible for this court to determine if the impugned signature on the voucher was not that of the second plaintiff. Similarly I find that it is necessary for the second plaintiff to call an expert witness to verify the signature of the second plaintiff. By reason of s 103 of the Evidence Act 1950, if at all it is for second plaintiff to call an expert witness to prove that the signature on the voucher is not that of the second plaintiff. B C D

[96] In this case the burden of proof is upon the second plaintiff to establish the alleged fraud of the resolution and the voucher payment (see ss 101, 102 and 103 of the Evidence Act 1950; *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC); [1980] 1 LNS 31). The burden of proof on that plaintiff is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the plaintiff throughout the trial. The evidential burden of proof is only shifted to the defendants once that plaintiff has discharged its burden of proof. If that plaintiff fails to discharge the original burden of proof, then the defendants need not adduce any evidence. Accordingly, if the plaintiff fails to establish her case it will not do for the plaintiff to say that the defendants have not established their defence (*Selvaduray v Chinniah* [1939] MLJ 253 (CA); [1939] 1 LNS 107; s 102 of the Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v Chinniah*, adopting the position stated by the Court of Appeal in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 said: E F G H

> In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440, at p 452:
>
> But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of I

> additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiffs evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[97] Applying the principles laid down in the above cases, the court do not agree with the submission of learned counsel's for the second plaintiff that it is for the second defendant to prove that the voucher was signed by the second plaintiff. In this present case, the second plaintiff has to prove that the signature on the payment voucher is not that of the second plaintiff.

[98] Learned counsel for the second plaintiff in his written submission had argued that since the first plaintiff did not authorise the second defendant to enter the consent order, the second defendant is guilty of conversion of the car. To support his contention the second plaintiff submitted that anyone who deals with goods in a manner inconsistent with the rights of the true owner is guilty of wrongful conversion. Mistake is no defence for liability in conversion is strict. He cited the case of *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505; [2006] 3 CLJ 93 to support his argument.

[99] I am of the opinion that the case and passage cited by learned counsel for the second plaintiff was decided and said in relation to unlawful conversion of property. The facts of that case and other cases on conversion in my view are therefore readily distinguishable from the present case.

[100] It is now necessary to give a brief outline on the law governing conversion. In the case of *Ng Teck Peng v Fimaco Sdn Bhd & 2 Ors* [2009] 1 LNS 1685, the court make reference to the case of *Moorgate Merchantile Co Ltd v Firen and Another* [1962] 2 All ER 467 relating to the definition of 'conversion'. In his judgment, Danckwerts LJ cited a passage from *Salmond on Torts* (12th Ed) on the definition of 'conversion' as follows:

> Conversion defined: A conversion is an act willful inference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. Two elements are combined in such inference: (1) a dealing with the chattel in a manner inconsistent

with the right of the person entitled to it, and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right.

[101] In the present case, the court finds that there is no conversion of the second plaintiff's car by the second defendant. The court notes that the car was transferred by the second plaintiff to the second defendant vide a payment voucher dated 11 July 2001 (p 49 NAD) as a part payment of the legal fees due for the second defendant. Further, pursuant to the consent order, the second defendant was authorised to sell the car and to use the proceed of the sale for the settlement of the legal fees due to him. In these circumstances the court finds that the second defendant has not converted the second plaintiff's car. There is no deliberate interference without lawful justification, in a manner inconsistent with the rights of the second plaintiff.

CONCLUSION

[102] For the reasons stated above, the court finds that the second plaintiff has failed to prove its case against the second defendant for unlawful appropriation of the second plaintiff's car. Similarly, the second plaintiff has failed to establish that the resolution dated 2 May 2001 and the payment voucher dated 11 July 2010 are forged documents.

[103] Accordingly, the second plaintiff's claim against the second defendant for losses and damages is dismissed. The second plaintiff is to bear its own costs.

Second plaintiff's claim against second defendant dismissed.

Reported by Kanesh Sundrum